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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,980	12/10/2003	Gerard Gieux	L741.03111	5130

7590

10/18/2005

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EXAMINER

DEVORE, PETER T

ART UNIT

PAPER NUMBER

3751

DATE MAILED: 10/18/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/730,980

Applicant(s)

GIEUX, GERARD

Examiner

Peter T. deVore

Art Unit

3751

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 August 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) 3-5, 8-15, 17, 21 and 22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 6, 7, 16, 18-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Election/Restrictions***

Claims 3-5, 8-15, 21, and 22 remain withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected Species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 4/15/05. Additionally, the amendment to claim 17 in Applicant's response mailed 8/3/05 inserts positive recitation of an envelope of foam that is harder than the foam of the pad, which is a feature not present in the elected Species. Therefore, claims 3-5, 8-15, 17, 21, and 22 are now withdrawn from consideration as being drawn to a nonelected Species.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller in view of Nadai.

The Miller reference discloses a powder applicator including a reservoir 22, storage means comprising very open foam pad 26, and a grid 30, but does not disclose a porous membrane covering the foam pad. However, the Nadai reference discloses a

similar applicator including a porous membrane 8 covering the foam pad 7 to protect the foam pad from abrasion. It would have been obvious to employ a porous membrane to cover the foam pad of the Miller applicator in view of Nadai to protect the foam pad from abrasion. Regarding claims 19 and 20, the Miller reference discloses an applicator as discussed supra, but remains silent as to the diameter and distribution of the pores in the pad. However, it would have been obvious to employ a pad having pores of a diameter and distribution within the claimed ranges, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 2336.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller in view of Nadai as applied to claim 2 above, and further in view of Bell.

The Miller reference discloses a powder applicator as discussed supra, but does not disclose that the orifices of the grids have a diminishing cross section away from the reservoir. However, the Bell reference discloses a similar applicator wherein the orifices (42, 44) have a diminishing cross section away from the pad to further control the flow rate of powder from the reservoir. It would have been obvious to modify the modified Miller applicator so that the orifices of the grids have a diminishing cross section away from the reservoir in view of Bell to further control the flow rate of powder from the reservoir.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller in view of Nadai as applied to claim 2 above, and further in view of Lee.

The Miller reference discloses a powder applicator as discussed supra, but does not disclose a ring which clamps the membrane to the grid. However, the Bell reference discloses a similar applicator including a ring 541 which clamps membrane 40 to grid 60 to ensure that all powder leaving through the reservoir passes through the membrane. It would have been obvious to modify the modified Miller applicator to employ a ring which clamps the membrane to the grid in view of Lee to ensure that all powder leaving through the reservoir passes through the membrane.

Claims 16 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller in view of Nadai as applied to claim 2 above, and further in view of Weihrauch.

Regarding claim 16, the Miller reference discloses a powder applicator as discussed supra, but does not disclose that the foam pad is mushroom shaped. However, the Weihrauch reference discloses a similar applicator wherein the applicator is mushroom shaped to maximize the application surface area (see Figure 4). It would have been obvious to modify the modified Miller applicator to have a mushroom shaped foam pad in view of Weihrauch to maximize the application surface area.

Regarding claim 18, the Miller reference discloses a powder applicator as discussed supra, but does not disclose that the exterior of the membrane is flocked. However, the Weihrauch reference discloses a similar applicator wherein the outer surface of the applicator is flocked (see col. 8, lines 55-57) to improve transfer of product from the applicator to the surface. It would have been obvious to modify the

modified Miller applicator so that the outer surface of the membrane is flocked in view of Weihrauch to improve transfer of product from the applicator to the surface.

### ***Response to Arguments***

Applicant's arguments filed 8/3/05 have been fully considered but they are not persuasive. Applicant first argues that the Miller reference does not disclose a storage means comprising a "very open foam pad". To make this point, Applicant states that Miller does not disclose that the foam pad has "large diameter pores communicating freely with each other so as to allow a large quantity of material to be stored in the pad". However, such language is not in the claim, and furthermore it is the Examiner's position that a foam pad such as that in the Miller device that is capable of dispensing powder will read on the claim language "storage means comprising a very open foam pad". Applicant next argues that the Nadai device is a "screen", not a "porous membrane". However, it is the Examiner's position that the "screen" of the Nadai device can also be considered a "porous membrane" since it is thin and flexible and allows material to pass through it. Applicant's next argues that one concerned with controlling flow of powder to a user's skin would not look to Nadai to solve the problem. However, in the rejection supra the motivation to combine the references is to protect the foam pad of the Miller device, not the motivations addressed in the argument. The motivation to add a feature to a known device does not have to be the same as Applicant's motivation.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Peter T. deVore whose telephone number is (571) 272-4884. The examiner can normally be reached on Monday to Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu can be reached on (571) 272-4835. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3751

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Pd *pd*

  
JUSTINE R. YU  
SUPERVISORY PATENT EXAMINER  
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*10/14/05*